

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

FRED QUIMBY,

Plaintiff,

v.

DUTCH MINING, LLC, BRUCE
BURROWS, EWALD DIENHART,

Defendants.

No. CV-05-1841-HU

FINDINGS & RECOMMENDATION

Freddie Busby Quimby
P.O. Box 403
Baker City, Oregon 97814

Plaintiff Pro Se

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Attorney for Defendants

SULLIVAN, Magistrate Judge:

Pro se plaintiff Freddie Busby Quimby brings this action
against defendants Dutch Mining, LLC, Bruce Burrows, and Ewald
Dienhart. Defendants move to dismiss on four separate grounds:
lack of subject matter jurisdiction, improper service, failure to

1 - FINDINGS & RECOMMENDATION

1 state a claim, and failure to join an indispensable party. I
2 recommend that the motion be granted on the basis of lack of
3 subject matter jurisdiction. I do not address the other grounds.

4 BACKGROUND

5 The following facts are taken from the Complaint, filed on
6 December 6, 2005. Dutch Mining, LLC is an "Oregon Registered
7 Limited Liability Company registered with Oregon Secretary of State
8 to do commercial business in the STATE OF OREGON." Compl. at p. 1.
9 Burrows and Dienhart are "both representatives of the above
10 company." Id.

11 Plaintiff alleges that in January 2005, Burrows hired
12 plaintiff and his brother Joe Quimby, to come to Merlin, Oregon to
13 work on the Benton Mine. Id. at p. 2. Both Fred and Joe Quimby
14 are alleged to be professional mining experts. Id. Plaintiff
15 alleges that the Benton Mine had serious problems. Id.

16 Burrows allegedly agreed to pay all expenses and \$35 per hour
17 for plaintiff's services. Id. Burrows allegedly had over 100
18 citations from the Mine Safety & Health Administration (MSHA) for
19 various unspecified violations. Id. Burrows gave copies of the
20 citations to plaintiff "to correct them." Id. Plaintiff allegedly
21 set up a mine safety program which was approved by MSHA. Id.

22 Plaintiff alleges that Burrows outlined several projects at
23 the mine and that he began all of these tasks and trained and
24 supervised workers. Id. at p. 3. Plaintiff suggests that a fire
25 destroyed some of his equipment and Burrows refused to pay for it.
26 Id. at pp. 2-3.

27 Plaintiff further alleges that Burrows caused damage to the
28 environment in various ways and expected plaintiff to work in

1 dangerous conditions. Id. at p. 3. He contends that Burrows stole
2 equipment from him and refused to pay rent on it. Id. at pp. 3-4.
3 He contends that when he complained about safety violations and not
4 being paid, Burrows sent him to eastern Oregon for a piece of
5 equipment and after plaintiff brought it out of the mountains, but
6 before he shipped it to Grants Pass, Burrows laid him off. Id. at
7 p. 4.

8 Burrows allegedly failed to pay plaintiff for the work
9 performed by plaintiff. Id. Plaintiff contends that defendants
10 owe him over \$16,000 for wages, equipment, and expenses for work
11 done on the Benton Mine and other work performed for Burrows. Id.
12 He further suggests that time spent writing reports filed with MSHA
13 was not paid. Id. Travel expenses to eastern Oregon to retrieve
14 equipment was not paid. Id. In a separate paragraph, he contends
15 that he is owed \$60,000 in wages to date. Id. at p. 6.

16 Plaintiff alleges that Burrows called plaintiff's parole
17 officer and lied to him, which in turn caused various restrictions
18 on plaintiff, which in turn caused severe financial problems and
19 confinement. Id. at p. 5. Although the restrictions were later
20 lifted when the parole officer "found out Burrows is a liar[,]"
21 plaintiff alleges that damage was already done. Id.

22 Plaintiff contends that Burrows interfered with a contract
23 plaintiff had with "Coyote Mining." Id. He further contends that
24 Dienhart failed to keep his promise to pay plaintiff if plaintiff
25 would "stay and take care of necessary payments[.]" Id.

26 Plaintiff asserts that he filed a "UCC transaction" against
27 Dienhart and Dutch Mining in the sum of \$11 million after Burrows
28 laid him off. Id. According to plaintiff, Dutch Mining and

1 Dienhart "defaulted," and this Court should enter a judgment in
2 plaintiff's favor in that amount. Id. at p. 6. Finally, plaintiff
3 alleges that Dutch Mining representatives stole technology and
4 other training, timbering techniques, equipment, and labor from
5 plaintiff, and that they "refuse to pay those services committing
6 fraud." Id.

7 In a section labeled "CONCLUSION," plaintiff asks the Court to
8 award \$11,076.195.42 in damages, plus costs and interest. Id. The
9 caption of the Complaint lists the following causes of action:
10 fraud, stealing services, deceit, "lieing," destroying environment,
11 and contract interference. Id. at p. 1.

12 DISCUSSION

13 I. Motion to Dismiss for Lack of Subject Matter Jurisdiction

14 A motion to dismiss brought pursuant to Federal Rule of Civil
15 Procedure 12(b)(1) addresses the court's subject matter
16 jurisdiction. Fed. R. Civ. P. 12(b)(1). The party asserting
17 jurisdiction bears the burden of proving that the court has subject
18 matter jurisdiction over his claims. Kokkonen v. Guardian Life
19 Ins. Co. of Am., 511 U.S. 375, 377 (1994).

20 A Rule 12(b)(1) motion may attack the substance of the
21 complaint's jurisdictional allegations even though the allegations
22 are formally sufficient. St. Clair v. City of Chico, 880 F.2d 199,
23 201 (9th Cir. 1989). The court may consider evidence outside the
24 pleadings to resolve factual disputes. Id.; see also Dreier v.
25 United States, 106 F.3d 844, 847 (9th Cir. 1996) (a challenge to
26 the court's subject matter jurisdiction under Rule 12(b)(1) may
27 rely on affidavits or any other evidence properly before the
28 court).

1 "Federal courts are courts of limited jurisdiction and possess
2 only that power authorized by the Constitution and statute."
3 Sandpiper Village Condo. Ass'n, Inc. v. Louisiana-Pacific Corp.,
4 428 F.3d 831, 841 (9th Cir. 2005) (internal quotation omitted).
5 Subject matter jurisdiction is generally conferred upon federal
6 district courts either through diversity jurisdiction, 28 U.S.C. §
7 1332, or federal question jurisdiction, 28 U.S.C. § 1331. Peralta
8 v. Hispanic Bus., Inc., 419 F.3d 1064, 1068 (9th Cir. 2005).

9 Defendants argue that nothing in the Complaint suggests the
10 presence of a federal claim to provide subject matter jurisdiction
11 on the basis of a federal question under 28 U.S.C. § 1332. In his
12 written response to the motion, plaintiff makes no attempt to argue
13 the presence of a federal claim. Even giving the Complaint a
14 liberal reading, as I am obligated to do when the plaintiff is
15 appearing pro se, King v. California, 784 F.2d 910, 912 (9th Cir.
16 1986) (allegations in a pro se complaint to be construed
17 liberally), I discern no allegations in support of federal question
18 jurisdiction.

19 For subject matter jurisdiction to be based on diversity
20 jurisdiction, the action must be between citizens of different
21 states with an amount in controversy of at least \$75,000. 28
22 U.S.C. § 1332. Because the Complaint recites an amount in
23 controversy of more than \$75,000, the issue here concerns the
24 citizenship of the respective parties.

25 Plaintiff does not affirmatively assert his residence or
26 citizenship as an allegation in the Complaint, but his address as
27 listed on the Complaint shows a post office box in Baker City,
28 Oregon. That is also the address he has on file with this Court.

1 As noted above, the Complaint asserts that Dutch Mining is an
2 Oregon registered LLC and that Burrows and Dienhart are both
3 representatives of the company. Compl. at p. 1. There is no
4 affirmative allegation of residence or citizenship regarding any of
5 the defendants.

6 Defendants argue that a "fair reading of the Complaint
7 indicates that the two defendants who are natural persons also
8 reside in Oregon as they are claimed to be 'representatives' of
9 Dutch Mining, LLC." Defts' Mem. at p. 3. Defendants note that
10 Rule 12(h) (3) provides that "[w]henver it appears by suggestion of
11 the parties or otherwise that the court lacks jurisdiction of the
12 subject matter, the court shall dismiss the action." Fed. R. Civ.
13 P. 12(h) (3).

14 In his response memorandum, plaintiff states that Dienhart
15 does not reside in Oregon. Although the statement is not properly
16 supported by an affidavit or declaration, I accept as true, for the
17 purposes of this motion, plaintiff's representation that Dienhart
18 does not reside in Oregon.

19 The relevant question in a diversity jurisdiction analysis is
20 the party's citizenship, not residence. Kanter v. Warner-Lambert
21 Co., 265 F.3d 853, 857 (9th Cir. 2001). A natural person's state
22 citizenship is determined by his or her state of domicile, not his
23 or her state of residence. Id. A person's domicile is the
24 person's permanent home, where the person resides with the
25 intention to remain or to which the person intends to return. Id.

26 Because the party asserting diversity jurisdiction bears the
27 burden of proof on that issue, failure to specify or prove state
28 citizenship is fatal to the assertion of diversity jurisdiction.

1 Id. at 857-58. Plaintiff must affirmatively demonstrate the
2 citizenship of all parties because there must be complete diversity
3 of citizenship between the parties opposed in interest. Kuntz v.
4 Lamar Corp., 385 F.3d 1177, 1181 (9th Cir. 2004). Each of the
5 plaintiffs in an action must be a citizen of a different state than
6 each of the defendants. Morris v. Princess Cruises, Inc., 236 F.3d
7 1061, 1067 (9th Cir. 2001).

8 Assuming for the purposes of this motion that plaintiff's
9 unsupported allegation of Dienhart's residence is an allegation
10 that Dienhart is not a citizen of Oregon for purposes of diversity
11 jurisdiction, the Complaint nonetheless suggests that complete
12 diversity is lacking and plaintiff fails to submit affirmative
13 evidence to the contrary. The Complaint suggests that plaintiff is
14 a citizen of Oregon. It also suggests that Burrows is a citizen of
15 Oregon because plaintiff alleges that Burrows is a representative
16 of an Oregon based LLC. Notably, in his response to the motion,
17 plaintiff does not dispute his Oregon citizenship or that of
18 Burrows.

19 Moreover, the Ninth Circuit recently held that an LLC is to be
20 treated like a partnership in assessing the LLC's citizenship for
21 the purposes of determining diversity jurisdiction. Johnson v.
22 Columbia Properties Anchorage, L.P., 437 F.3d 894, 899 (9th Cir.
23 2006). Thus, "an LLC is a citizen of every state of which its
24 owners/members are citizens." Id.

25 Based on the allegations in the Complaint, "it appears by
26 suggestion of the parties, or otherwise," that this Court lacks
27 subject matter jurisdiction. With both plaintiff and Burrows
28 appearing to be citizens of Oregon, complete diversity is lacking.

1 Additionally, based on the allegation that Burrows is a
2 "representative" of Dutch Mining LLC, the Complaint suggests that
3 he is an owner or member of the LLC and thus, his Oregon
4 citizenship is attributed to Dutch Mining. Thus, even if
5 plaintiff could prove that Dienhart was not a citizen of Oregon,
6 that fact is irrelevant because by virtue of plaintiff failing to
7 disprove what is suggested by the Complaint (that both plaintiff
8 and Burrows are Oregon citizens), there is no complete diversity.

9 Because I conclude that this Court lacks subject matter
10 jurisdiction, it is inappropriate for me to address the other bases
11 for dismissal asserted by defendants.

12 CONCLUSION

13 I recommend that defendants' motion to dismiss (#4) be granted
14 on the basis of lack of subject matter jurisdiction. I further
15 recommend that the dismissal be without prejudice to plaintiff
16 refiling his claims in state court, or filing an amended complaint
17 in this case in this Court if plaintiff is able to assert a basis
18 for federal court subject matter jurisdiction. Any such amended
19 complaint is due ten (10) days following the Article III District
20 Judge's ruling on this Findings & Recommendation.

21 SCHEDULING ORDER

22 The above Findings and Recommendation will be referred to a
23 United States District Judge for review. Objections, if any, are
24 due March 31, 2006. If no objections are filed, review of the
25 Findings and Recommendation will go under advisement on that date.

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1 If objections are filed, a response to the objections is due
2 April 14, 2006, and the review of the Findings and Recommendation
3 will go under advisement on that date.

4 IT IS SO ORDERED.

5 Dated this 16th day of March, 2006.

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8 /s/ Patricia Sullivan
9 Patricia Sullivan
United States Magistrate Judge
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